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September 19, 2012

Dick Ratliff, Esq.
Senior Staff Counsel
Mike Monasmith
Project Manager
California Energy Commission
1516 Ninth Street – MS 2000
Sacramento, CA 95814

Re: Hidden Hills SEGS – *Motion in Limine for Committee Ruling to Ensure the Final Staff Assessment Conforms to Substantive Requirements of the California Environmental Quality Act ("CEQA")*

Dear Dick and Mike:

The County has reviewed the Motion in Limine[1] submitted by Applicant, BrightSource Energy, in connection with the Hidden Hills SEGS licensing process. Although the County is not a party to the proceedings, as a responsible governmental agency, it is compelled to comment on argument (C) contained in the Applicant's brief. In that argument, the Applicant contends that the "no project" alternative must include an analysis of "up to 170 residences and all the potential environmental impacts associated with such development and use." Applicant argues that the existing land use entitlements require, as a matter of law, an analysis under 14 C.C.R. 15126.6(e).[2] As discussed below, an analysis of the "no project" alternative requires a review of a number of factors and is not simply governed by the existence or non-existence of land use entitlements. Applicant's narrow reading is incorrect and its request should be denied.

Application of CEQA to No Project Analysis

The "no project" alternative analysis required by CEQA Guideline 15126.6(e) requires a determination of "what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." The existence of land use entitlements is but one fact contributing to that determination. Further guidance is provided in Guideline 15126.6(e)(3)(B), which provides:

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[1] Applicant couches its request in the form of a motion of limine, which is defined as "a written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements. Purpose of such motion is to avoid injection into trial of materials which are irrelevant, inadmissible and prejudicial." *Black's Law Dictionary, Abridged Fifth Edition.* The motion seeks relief which is better characterized as a motion for summary adjudication of issues, albeit without a statement of undisputed facts.

[2] All references are to Title 14 of the California Code of Regulation. For ease, the applicable sections will be referred to as the CEQA guidelines.

> If disapproval of the project is under consideration would result in predictable actions by others, such as the proposal of some other project, this "no project" consequence should be discussed. In certain circumstances, the no project alternative means "no build" wherein the existing environmental setting is maintained. However, where failure to proceed with the project will not result in the preservation of existing environmental conditions, the analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment.

However, as with the determination of each alternative, the "no project" alternative is governed by the rule of reason. CEQA Guideline 15126.6(f). The law is clear that "an EIR need not consider 'an alternative whose effect cannot be reasonably ascertained and whose implementation is remote and speculative' [citation], an EIR is not obliged to examine 'every conceivable variation of the "no project" alternative." *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 246 (citing *Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286-288.)

Contrary to the assertion by the Applicant, the mere existence of land use entitlements does not create a presumption that the rights bestowed by those entitlements would be exercised if the proposed project is not approved. Instead, the existence of those entitlements are but one factor contributing to the overall determination of what is "reasonably expected to occur in the foreseeable future if the project" is not approved.

Scope of Ministerial Permits

Should the "no project" alternative include an analysis of the rights bestowed on the property owners under the current land use entitlements, it is necessary to clarify the scope of those rights. The Applicant asserts that the current land use entitlements, an approved subdivision map, bestows an unfettered right to build a residential structure on each of the 170 lots existing on the project site. This is simply incorrect. Although the permits are ministerial, an applicant is not guaranteed that a permit will be issued or, if the permit is issued, a certificate of occupancy would be granted. Any application for a ministerial permit must meet the "fixed standards or objective measures" before the permit will be issued. In the instance of a request for a building permit for a residential structure, the applicant must demonstrate that there is a sufficient potable water source to serve the residence. (See, 2010 California Plumbing Code, Chapter 6, section 601.1.) Additionally, any residential unit built on the project site must also install automatic fire sprinkler systems. (See, 2010 California Residential Code, Section R313.) The Charleston View area is not served by a water system; instead, water is supply by individual wells. Therefore, if a property owner wishes to build a house,

a well permit would be issued enabling the property owner to drill a well. A building permit would be issued, but conditioned upon the property owner proving the existence of potable water. Therefore, if a well is drilled and construction undertaken, a certificate of occupancy would not be granted unless the Environmental Health Department confirms the existence of potable water and the Building and Safety Department determines the fire sprinkler system requirements are met. If not, the well must be abandoned in accordance with state law (i.e. sealed) and a certificate of occupancy denied.

It is not uncommon in areas where potable water supplies are uncertain for a property owner to obtain a well permit and drill a well before seeking a building permit. After the well is drilled, the Environmental Health Department then determines if the well produces a sufficient flow to satisfy the requirements for potability. If not, that information is communicated to the Building and Safety Department and a building permit will not be issued.

Therefore, the construction of any residential unit on the project site is conditioned upon compliance with applicable building codes, including those requiring the existence of an adequate water source.

"Facts on the Ground"

The Applicant is correct in that CEC staff must look at the "facts on the ground" when determining the scope of the "no project" alternative. However, those "facts" are not limited, as a matter of law, to the existing land use entitlements. Instead, staff must consider all facts when determining "what would reasonably be expected to occur in the foreseeable future if the project were not approved." The law does not mandate staff to assume that existing land use entitlements will be exercised. The "facts on the ground" may warrant a finding that the current plan or right is so "remote and speculative" as to warrant its exclusion from the analysis. In this case, the "facts" not only include the land use entitlements cited by the Applicant, but also the following facts: (1) the subdivision map is 40 years old; (2) fewer than 6 residential building permits have been issued for the Charleston View area, including the project site, during the past ten years; (3) no plans have been identified to construct any residential units on any of the lots should the proposed project not proceed; (4) the site is located in an area with very limited services; (5) the site sits within a short commute to areas with large housing stock (Pahrump and Las Vegas, Nevada); and (6) current economic predictors suggest residential development of the project site is unlikely in the near future. Moreover, the overdraft status of the ground water basis may create further barriers to full development of the lots located on the project site.

Conclusion

Section 15126.6 of the CEQA Guidelines requires CEC staff to analyze a number of factors before determining the scope of the "no project" alternative. Applicant's attempt to define those factors before evidentiary hearings is premature and contrary to the requirements of CEQA. Applicant will have every opportunity to make its case after the facts have been fully vetted. As such, the requested relief should be denied.

Should you wish to discuss this matter in more detail, please feel free to contact me.

Sincerely,

Dana M. Crom
Deputy County Counsel
Inyo County Counsel

DC/dg
c: Kevin Carunchio, CAO
Josh Hart, Planning Director
Randy Keller, County Counsel
Greg James, Special Counsel

dg/Planning/BrightSource/MotioninLimine.Ltr.